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ship between the surety and the principal of such an intimate degree that whatever affects the principal will also affect the surety. The relationship which the law recognizes under such circumstances ranges from that of father and son²⁸ to mother-in-law and son-in-law.²⁹ But such cases are beyond the problem under discussion, because they really are based on the proposition that when such a bond exists, principal and surety are one in thought and the duress practiced on the principal is also practiced on the surety.

This practically exhausts the authorities, although there are other cases cited in the texts and in the cases. But upon examination it will be found that what they say on the subject is dicta.³⁰ They are used because the material is not so plentiful as the text writers could wish for and hence they are interpreted beyond their real meaning.

E. L. P.

EFFECT OF MISTAKE OF PERSON, MISREPRESENTATION OF PERSON AND IMPERSONATION IN CRIMES, CONTRACTS AND NEGOTIABLE INSTRUMENTS.—An interesting question arises in the law of crimes, contracts, sales, carriers and negotiable instruments, when the courts have had to determine the effect of mistake of person, misrepresentation of person and impersonation. A review of the decisions of the courts on this question reveals the existence of some slight confusion, but the decisions on analogous situations in these branches of the law are not inconsistent in the methods of reasoning used and the conclusions reached.

In the law of crimes when A, who wants to kill B, mistakes X for B and wounds him, the courts have uniformly held A guilty on an indictment for assault and battery with intent to kill X. A wounded X because he believed him to be B whom he wanted to kill. He did not want to kill X, but he did intend to kill the person physically present before him. Since the person wounded was the person physically present before him, it follows that A intended to commit an assault and battery on X with intent to kill him. By this reasoning the intent, to which the courts give effect, is based on the facts of the assault and not on A's belief. Thus the specific intent necessary for the crime was present.¹

The question arises in the law governing the formation of executory contracts in the following type of case: A writes to B, using the name of X and represents himself to be X; B is induced

²⁸Osborn v. Robbins, 36 N. Y. 365 (1867).

²⁹Fountain v. Bigham, *supra*.

³⁰Hawes v. Marchant, 1 Curtis 136 (U. S. Circuit Ct., 1852); Tucker v. The State, 72 Ind. 242 (1880); Putnam v. Schuyler, 4 Hun. 166 (N. Y. 1875); Thompson v. Lockwood, 15 Johns. 256 (N. Y. 1818); Simms v. Barefoot's Exrs., 2 Haywood 606 (N. C. 1806); Thompson v. Buckhannon, 2 J. J. Marshall 416 (Ky. 1829).

¹Regina v. Smith, 33 Eng. Law and Eq. Rep. 567 (1855); People v. Torres, 38 Cal. 141 (1869); McGehee v. State, 62 Miss. 772 (1885).

to enter into negotiations with A on the faith of this representation with the view of forming a contract. There must be a meeting of the minds of the parties to make a valid contract. Therefore, the courts have held that the completion of the negotiations so entered into will not effect a contract. B did not know A, and X was the only person with whom he believed he was negotiating. B's mind never for an instant rested on A, and X was a stranger to the negotiations.² There was no *consensus ad idem* between the parties to the negotiations. The effect of B's intention in this situation, based on the facts of the transaction, render the completed negotiations void as a contract.³ By the same reasoning, there is no contract effected when A represents himself to B, in person or by letter, to be the agent of X, a person of good repute, when in fact A is not the agent of X. On the strength of this representation B is induced to enter into negotiations with A as such agent. Here, again, B did not intend to contract with A, but entered into the negotiations relying on the reputation of X and intended to contract with X only.⁴

The question is found in the law of sales in three classes of cases. The first class of cases in which the question arises is when A, using the name of X and representing himself to be X, writes to B and orders goods from him. Relying on the representation and in compliance with the order, B forwards the goods which A obtains possession of at the place of delivery. The courts apply the same reasoning as in the analogous situation in the law of contracts and hold that the transaction was not a sale. A got no title to the goods. From the facts of the transaction it cannot be said that B intended to sell to A. He intended to sell to X and consented to vest his title to the goods in X only.⁵

The second class of cases arises when A falsely represents himself to B, in person or by letter, to be the agent of X, and induces B to let him have goods on the strength of this misrepresentation. The courts have decided that this transaction is not a sale and that A gets no title to the goods. The decisions rest on the same grounds as in the analogous case in the law of contracts. B, relying on the reputation of X, the principal, intended to sell only to him and would not have permitted A to have the goods if X were not his principal.⁶

The recent case of *Phillips v. Brooks, Limited*,⁷ presents in the law of sales the third class of case in which the question under

²Cundy v. Lindsay, 3 App. Cases 459 (Eng. 1878)

³Story on Contracts, Vol. 1, p. 519; Pollock, Contracts, 3rd. Am. Ed. (1906) p. 592; Anson, Law of Contracts, Am. Ed. (1919) § 184, p. 206.

⁴Kingsford v. Merry, 1 H. & N. 503, 156 Eng. Rep. Exch. 1299 (1856); Rogers v. Dutton, 180 Mass. 187, 65 N. E. 56 (1902).

⁵Cundy v. Lindsay, *supra*; Bruhl v. Coleman et al. 113 Ga. 1102, 39 S. E. 481 (1901).

⁶Barker v. Dinsmore, 72 Pa. 427 (1872); Peters Box Co. v. Lesh, 119 Ill. 98, 20 N. E. 291 (1889).

⁷Phillips v. Brooks, Limited, (1919) 2 K. B. 243.

discussion arises. A impersonated X, a well known man about town, and induced B, on the strength of the impersonation, to sell him jewelry. A, in this case, was physically present before B, and the situation on its facts is substantially the same as the one in criminal law above. In deciding that A got title to the goods and that B could not recover the goods from A's vendee, who was a bona fide purchaser for value without notice, the court followed the reasoning used by the courts in the analogous situation in criminal law.⁸ B believed that X was before him and that he was selling the jewelry to X it is true; it is also true that B would not have sold the goods to A if he had known that A was not X. However, A, not X, was physically present before him, identified by sight and hearing, and B did intend to sell the goods to A, the person in front of him, and since A was a party to the agreement to sell there was a meeting of the minds of the parties to all of the terms of the agreement. Therefore, the transaction was a sale and title to the goods passed to A.⁹ The intention of B to sell to A is based on the facts of the transaction and is clearly correct. This is the view adopted by the majority of the courts of the United States in recent decisions.¹⁰

The same question arises in determining the liability of a carrier to the consignor of goods for a delivery to an impostor. When A in person, representing himself as X, induces B to let him have goods on the strength of the impersonation and B entrusts the goods to a carrier for delivery to X, in the absence of negligence *qua* the delivery, the carrier is not liable in trover and conversion if he delivers the goods to A. The courts put the decision on the grounds that the delivery was in accordance with B's directions, since A was physically present at the time of the sale, he was the person to whom the goods were sent.¹¹ The

⁸It is interesting to note that this is the first time this question was decided in England and that the court of Kings Bench bases its decision on the case of *Edmunds v. Merchants Transportation Co.*, 135 Mass. 283 (1883), in which the same reasoning is used.

⁹It must be remembered that the title to the goods acquired by A is not indefeasible. It is subject to be avoided by the vendor before the rights of innocent third parties intervene.

¹⁰*Perkins et al. v. Anderson et al.* 65 Iowa 398 (1884); *Robertson v. Coleman*, 141 Mass. 231 (1886); *Hickey v. McDonald Bros.*, 151 Ala. 497 (1907); *Phelps v. McQuade*, 220 N. Y. 232 (1917). However, in *Loeffel v. Pohlman*, 47 Mo. App. 574 (1891) and *Windle v. Citizens' National Bank*, 216 S. W. 1023 (Mo. 1920), it is held on the same state of facts that no title to the goods passes from B to A. The decisions in these cases are based on decisions in cases of misrepresentations of person by writing and misrepresentation of agency and the courts fail to recognize the distinctions that exist in these cases.

¹¹*Dunbar v. Boston & Providence R. R. Co.*, 110 Mass. 26 (1872); *Edmunds v. Merchants Transportation Co.*, 135 Mass. 283 (1883). While these cases are justified on the principle that a carrier is not liable for delivery of goods to the true owner made in disregard of the directions of the consignor, *The Idaho*, 93 U. S. 575 (1876), they can hardly be justified on the grounds given by the courts; for the directions given by the consignor were "deliver to X" and the carrier delivered the goods to A. Such a delivery can not be said to be in accordance with the directions of the consignor.

contractual liability of the carrier is thus discharged. It is quite clear in this situation that A was the true owner of the goods.¹² In the situations in this branch of the law analogous to the first two classes of cases in the law of sales a different concept of the question is found. The carrier is not liable for the delivery of goods to an impostor which were addressed to him, if there was no negligence *qua* the delivery. The reason for this is that the contract of the carrier is to deliver according to directions. It is under no duty to ascertain the title of the consignee in these cases. The carrier is, therefore, justified in delivering the goods, as addressed, to the impostor.¹³

In the law of negotiable instruments this question is also raised in three classes of cases analogous to those in the law of sales. The first arises when A obtains delivery of a check or negotiable instrument by writing a letter to B representing that he is X, whom B knows. It is held that the drawee bank can not charge B with the amount paid by it on the check. By applying the reasoning used in the same situation in sales it follows that B did not intend the money to be paid on A's order. He intended the money to be paid on the order of X only, hence the bank paid the money on the order of someone not intended by B and the bank is liable for the money paid.¹⁴

When A falsely represents that he is the agent of X, whom B knows, when in fact he is not X's agent, and on the faith of the misrepresentation B gives him a check payable to X, the second class of cases is presented. A indorses the check with X's name and the bank is liable for the amount paid by it on the check. A was not intended as payee of the check by B. B intended the money to be paid only on X's order.¹⁵ The reasoning used to reach this result is consistent with that used in the same situation in the law of sales.

The third class of cases in which the question is found is when A, impersonating X, applies to B for a loan and obtains personal delivery of a check or negotiable instrument. B cannot recover from the drawee bank the amount it paid on the check. It is true B believed that he delivered the check to X and he wanted X to be the payee, yet actually B delivered the check to the person who was physically present before him, and he is held to have intended that that person be the payee. The drawee bank, therefore, paid the money to the order of a person to whose order B

¹²*Phelps v. McQuade and Phillips v. Brooks, Limited, supra.*

¹³*McKean v. McIvor et al.*, (1870) L. R. 6 Exch. 36; *Samuel v. Cheney*, 135 Mass. 278 (1883). As to cases having similar facts but when there is negligence *qua* the delivery see: *American Express Co. v. Fletcher*, 25 Ind. 492 (1865); *Price v. Oswego & Syracuse R. R. Co.*, 50 N. Y. 213 (1872); *Pacific Express Co. v. Shearer*, 160 Ill. 215 (1896).

¹⁴*Mercantile National Bank v. Silverman*, 148 App. Div. 1 (N. Y. 1911).

¹⁵*Goodfellow v. First Nat. Bank*, 71 Wash. 554 (1913).

is held to have intended it to be paid, and is not liable for such payment.¹⁶

In the analogous situations existing in the above branches of the law the reasoning used by the courts in determining the effect of mistake of person, misrepresentation of person and impersonation are consistent and the results, as affecting the person claiming a right in these situations, are essentially the same. The only exception is found in the law of carriers in the cases where there is misrepresentation of person by writing or a misrepresentation of agency, in which cases the carrier is not liable in the absence of negligence *qua* the delivery of the goods.

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¹⁶*Emporia Nat. Bank v. Shotwell*, 35 Kan. 360 (1886); *U. S. v. National Exchange Bank*, 45 Fed. 163 (1891); *Land Title & Trust Co. v. Northwest National Bank*, 196 Pa. 230 (1900). For a general discussion on this see: *Brannen's Negotiable Instruments Law*, 3rd. Ed. 1919. pp. 80-90, 322, 323, 347.